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THE STANDARD OF CARE IN EMERGENCIES
ALVIN E. EVANS*

1. WHAT IS AN EMERGENCY?

A general definition of an emergency is sometimes attempted by the courts, as in Iowa, where it has been said that an emergency is a sudden or unexpected happening or occasion calling for immediate action.1 Obviously this definition does not give an adequate basis for an emergency instruction to the jury. Generally there are the following elements in emergency cases (a) the actor finds himself in a position where sudden peril threatens himself or another, or both, (b) he has available alternative courses of action, (e) there is no adequate opportunity to consider which is the better alternative; (d) he is aware of the emergency;2 (e) an injury results from the choice made. It would therefore appear that the trial judge should not give an emergency instruction to the jury, either where there were no alternatives, or where there was time for the actor to deliberate, or where the course taken by him was the obvious one. Other instructions will be more appropriate. Kentucky has formulated an instruction for such cases.3

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3 Louisville Taxicab & Transfer Co. v. Ramey, 222 Ky. 286, 288, 300 S. W 890, 891 (1928) “Although you may believe from the evidence that the plaintiff's car was damaged in the collision with defendant's taxicab, yet if you further believe from the evidence that at said time and place the defendant's driver, while exercising ordinary care in the operation of the taxicab, was suddenly and unexpectedly confronted by an approaching car, and thereby placed in imminent danger of great bodily harm, real or to him reasonably apparent, then he had the right to operate his taxicab in such a manner as a reasonably prudent man would have done under similar circumstances to avoid such danger, if any, considering traffic conditions upon the street at the time; and if under such conditions he did so operate said taxicab and so doing run upon and damaged plaintiff's car, the defendant is not liable therefor.” See also Moreland v. Stone, 292 Ky. 621, 166 S.W (2d) 998 (1942).
There is not much discussion in the books of the standard of care in emergencies. They do speak briefly of an active choice between risks or mistakes made in cases of sudden peril. But the problem has not loomed large. Like contributory negligence, it need not be pleaded but is open to proof, and the burden of proof is on the party claiming the benefit of an emergency. An early intimation of the source of the present emergency doctrine is perhaps traceable to the famous Squib case.

Fright and Confusion. Many, perhaps most people will not react altogether rationally when faced with sudden danger, either to themselves or to another. Thus, the defendant, a driver, on suddenly finding a child on the running board, turned out of the highway and struck a telephone pole, thus killing the child. Not only did the court not give a res ipsa loquitur instruction, but even directed a verdict for the defendant. Another defendant put his foot on the accelerator instead of on the brakes and did not sound his claxon. Thus time the court

4 Pollock on Torts (12th ed. 1923) 484.
5 Prosser on Torts (1941) p. 242, devotes about one page to the subject and there appears to be no observation on it by Harper on Torts (1933). See Notes, 13 N. Y. L. Q. R. 120 (1936), 9 Notre Dame Lawyer 244 (1934) 5 Temple L. Quart. 665 (1931) 6 A. L. R. 680; 27 ib. 1179; 79 A. L. R. 1277; 111 ib. 1019; Cf. 49 Harv. L. Rev. 154 (1936), 9 Col. L. Rev 521 (1909), Restatement of Torts, secs. 296, 470.
7 Scott v Shepherd, 2 W Bl. 882, 96 Eng. Rep. 525 (K. B. 1773) where it was held that the two intervening squib throwers acted instinctively or automatically and thus were not liable for the ultimate injury and did not break the causation of the original act. See also Jones v. Boyce, 1 Stark 493, 171 Eng. Rep. 540 (N. P 1818) ("If I place a man in such a situation that he must adopt a perilous alternative I am responsible for the consequences"), Coulter v. Am. Merchants Un. Co., 56 N. Y. 585 (1874) (Plaintiff faced with sudden emergency, a horse and wagon being upon her, instinctively jumped to one side and struck a wall and injured herself. She is justified in jumping without looking) This matter is further developed on pages 215-218. There is no emergency heading in the Century Digest, 1658-1896. There is a heading with five citations in the First Decennial Digest, 1897-1906, Negligence, sec. 134 (28). One notes the close correspondence of the popular use of the automobile.
8 Young v Hofferber, 177 Wash. 234, 31 P (2d) 95 (1933). Harrigan v. Interurban Ry. Co., 187 Iowa 679, 149 N. W 895 (1914) (A section hand on a hand car saw an approaching train and because of his fright, loosed his hold on the handle and fell off. The question of his contributory negligence is for the jury), Polonsky v. Dobrosky, 313 Pa. 73, 169 Atl. 93 (1933) (Defendant did not turn off onto the shoulder of the highway to prevent a collision with an oncoming car, because of her fright and confusion. Sued by guest rider).
left it to the jury whether he showed adequate alertness in an emergency. So it is held that a defendant who seizes the wheel from the driver and runs the vehicle into a building by the street side is not liable for damages, his act being due to fright.

Fright and confusion have become so associated with an emergency that the question has been raised whether a person who testified that he was perfectly calm could claim an emergency instruction and the lower court ruled that he was contributorily negligent under the circumstances. There are many cases where the party in an emergency has no alternative at all. In that event he should not be required to excuse his conduct by seeking an emergency instruction.

True alternatives. There are many cases of true alternatives. Thus, if a child has been struck by a street car and is

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10 Hooks v. Ortor, 30 S. W (2d) 681 (Tex. Civ. App. 1930). See 5 Temple L. Q. 665 (1931). See also Knowlan v. Shipley-Massingham Co., 266 Pa. 117, 109 Atl. 629 (1920) (A child was injured by defendant. On action by the parents, the defendant claimed an instruction on contributory negligence because the mother permitted the child to escape from her. The mother was granted an emergency instruction on account of fright and confusion).
12 Bright v. Wheelock, 323 Mo. 840, 20 S. W (2d) 684 (1929) (Due to bad coupler, plaintiff was obliged to operate it by hand. Because of the disturbance of the moving cars, he was compelled to fall or to step from the engine pilot—was hurt), Ransom v. Union Depot Co., 126 S. W 785 (Mo. App. 1910) (Expressman unloading a truck moved the truck on the sudden approach of a train to a track where another track was. If it collided with the other truck and the latter was forced onto the same track. It was hurled by the train and struck the plaintiff).
13 Greyhound Lines Inc. v. Noller, 36 F (2d) 443 (7th, 1930) (Defendant's bus driver had two alternatives, when another car had cut in ahead of him and suddenly stopped: (a) turn right into the curb and concrete abutment; (b) turn left into the traffic from the opposite direction. The choice of going ahead and striking the car ahead does not seem to be a true alternative); Louisville & N. Ry. Co. v. Wright, 193 Ky. 59, 235 S. W 1 (1921) (Fireman caught between engine and tender. Engineer may stop and back up or go forward), Wynn v. Central Park Ry. Co., 133 N. Y. 575, 30 N. E. 721 (1892) (Horse drawn street car's brake broken. Driver may shout to persons ahead, or drive team off track. It seems to be no alternative to say he may keep on going); Stabenan v. Atlantic Co., 155 N. Y. 511, 30 N. E. 277 (1898) (Child on street car track. Motorman may shut off power and apply brakes or reverse the power and risk blowing a fuse); Raoslavovic v. N. Y. Central R. Co., 246 N. Y. 91, 156 N. E. 625 (1927) (Deck hand of a vessel fell overboard and drowned by suction of the propeller, when the engines were reversed. Pilot had choice to reverse or proceed. If reversal is
under it, the alternatives may be to go forward, to back up, or to jack up the car.\textsuperscript{14} The failure to adopt the better course is not necessarily evidence of negligence. So a fireman on a railway saw a vehicle near a crossing which his train was approaching and could himself have set the brakes and could have sounded the alarm. He may not be regarded as negligent under the circumstances, however, if, instead of doing these possible acts, he warned the engineer and thus occasioned delay of the doing of the act which the circumstances required.\textsuperscript{15} An emergency instruction was given. Where action must be taken as soon as it is reasonably possible but there is, in fact, a period available for deliberation, the court may refuse a party an emergency instruction.\textsuperscript{16}

The emergency doctrine excuses the actor from adopting the course or method which would perhaps have been the better or best one. Thus, a flagman’s motioning may be misunderstood;\textsuperscript{17} the driver of an express truck, in haste to avoid an oncoming tram, may not adequately consider the safety of others;\textsuperscript{18} a driver who sees oncoming traffic in a narrow street has no time shown to be good seamanship, petition should be dismissed).\textsuperscript{19} Ackerman v. Union Traction Co., 205 Pa. 477, 55 Atl. 16 (1903) (Boy on steps of a caboose running on track parallel to a very near street car track. Moving street car would hit him. Motorman could either stop or shout advice to jump off or climb onto bumper); Brown v. French, 104 Pa. 604 (1883) (Plaintiff's intestate tried to cross river and fouled a barge in tow of a steamer. The pilot of steamer could either back while decedent was thus under water or go forward); Gumz v. C. St. P & M. Ry Co., 52 Wis. 672, 10 N. W 11 (1881) (Hand car about to be overtaken by train. Operator may stop and get off or speed ahead); Lynch v. Northern Pac. Ry Co., 84 Wis. 552, 54 N. W 610 (1893) (Plaintiff's horses running wildly along highway close to and paralleling the railway. The train may check speed or stop); Bishop v. Belle City St. Railway Co., 92 Wis. 139, 65 N. W 733 (1896).

\textsuperscript{14} Carney v. Concord St. Ry Co., 72 N. H. 364, 57 Atl. 218 (1903).
\textsuperscript{15} Collette v Boston & M. R. R., 83 N. H. 210, 140 Atl. 176 (1927).
\textsuperscript{16} Peabody v. Northern Pac. Ry Co., 80 Mont. 492, 261 Pac. 261 (1927) (A gate keeper at a crossing where many railway tracks crossed a street, had raised the bar after a train had passed, thus admitting the plaintiff to pass from the north onto the tracks. Then he saw a switching engine approaching on a track which plaintiff had already crossed. He also saw a vehicle coming from the south a considerable distance away. To prevent the latter from entering the trackage area, he again lowered the bar and struck plaintiff with it. His evidence showed that he anticipated plaintiff would be hit. There was no adequate reason for the immediate dropping of the bar.
\textsuperscript{17} Floyd v. P & R. Co., 162 Pa. 29, 29 Atl. 396 (1894).
\textsuperscript{18} Ransom v. Union Depot Co., 126 S. W 785 (Mo. App. 1910).
for a nice calculation of the available space left to himself;\textsuperscript{19} a rider in the rear of a truck, which truck narrowly escaped a rear end collision, may not be able accurately to estimate its own hazards and may injure himself by jumping;\textsuperscript{20} a driver may unwisely prepare to jump by failure to calculate the speed of a car coming from the side.\textsuperscript{21} The most singular example found of mistaken conduct which may still not amount to contributory negligence because of the emergency is the case of a woman who lost her balance while alighting from a bus, seized the rear bumper and was dragged three-fourths of a mile.\textsuperscript{22} So one who mistakenly shuts off a fan operating in a mine to blow away obnoxious gases, believing the cessation to be necessary because of a fire raging in the mine, may have an emergency instruction,\textsuperscript{23} as also a motorman who, having knocked a child under the street car, backs up the car and perhaps runs over the child again;\textsuperscript{24} and a plaintiff who rides on a wagon about to cross a railway track is not imprudent in leaping from the wagon, though the team, becoming frightened, ran along the track but was not touched by the train.\textsuperscript{25} "One may act mistakenly, yet prudently."\textsuperscript{26}

\textit{Emergency created by children.} When young children are injured, they are not guilty of contributory negligence. Where a child is injured there are four possible solutions. (1) Defendant's negligence will create a liability, though the child did not exercise care;\textsuperscript{27} (2) There was an inevitable accident which does not call for an emergency rule;\textsuperscript{28} (3) A question of last clear
chance may arise, and (4) Defendant may claim an emergency instruction to offset the application of the last clear chance.\footnote{KENTUCKY LAW JOURNAL}  

Somewhat similar to the case of children is that of the country bumpkin on whom a practical joke was played.\footnote{Plaintiff, a man about 40, was riding for the first time on a railway. Another passenger, abetted by the tram crew, threatened to take him to Chattanooga and on his arrival there have him shot as a spy. Other terroristic threats, such as the removal of his vital parts, were made to him. Plaintiff became frightened and leaped through a window of the moving tram to escape his tormentors and was injured. In answer to the plea of contributory negligence the court instructed the jury that it should not find him guilty of contributory negligence, if a reasonably prudent man would have done as he did under similar circumstances. It also said that it made no difference whether he was a Solomon or a simpleton. The jury found for the plaintiff. It is submitted that there were other adequate grounds for holding the defendant and that, in fact, a reasonably prudent man would not have been thus terrorized nor would he have jumped from the tram. This shows that an emergency instruction was not the proper procedure, for due prudence must be used, even in an emergency.}

Emergency and the Last Clear Chance. The plaintiff's injury may be the result of (a) an inevitable accident, (b) his own negligence, (c) his own negligence and that of defendant, (d) the plaintiff may have put himself in a position of peril, seeing which the defendant might, with due prudence, have avoided the harm, (e) either defendant or plaintiff may have had no time to deliberate and as a consequence have failed to follow the course which might have avoided the accident.

In Hartley v. Lasater the plaintiff was riding a motorcycle and, unknown to him, the defendant was driving behind him.\footnote{Donker v. Powers, 230 Mich. 237, 202 N. W 989 (1925) (Children were on bicycles and at least one was on the wrong side of the road. It is a jury question whether defendant was faced with an emergency and, if so, whether he acted prudently. The children were respectively 18, 16, and 14.)}
The plaintiff crossed to the left without warning, to take a side road, and was struck by the defendant. The plaintiff, admitting his own negligence, claimed that the defendant had the last clear chance. The court gave an excellent discussion of the last clear chance doctrine and of an emergency. The last clear chance implies that there was negligence on the part of the plaintiff, culminating in peril from which he could not extricate himself, that the defendant knew of the plaintiff's peril and was able to avoid injury to him by the exercise of reasonable care. So it implies an opportunity for thought and mental direction. The court intimated that the defendant may have been faced with an emergency if the accident occurred while he was driving at a proper speed and when he had no adequate period for deliberation. In this way, he might avoid liability. A finding against a last clear chance would thus be explained either by unavoidable accident as matters then stood or by an emergency. So an occasion permitting deliberation invokes a last clear chance instruction and implies a denial of an emergency instruction. If the evidence on the point is conflicting probably an instruction involving each doctrine is desirable.

In *Kentucky Traction & Terminal Co. v. Roschli's Admr* there was some expression in the opinion concerning an emergency facing the defendant, but the evidence seems to show that there was no last clear chance and no choice of alternatives and a verdict was directed for the defendant. In *Sieb v Central Pennsylvania Traction Co.* the plaintiff excused his otherwise contributorily negligent conduct by the emergency facing him and the defendant was held to have been negligent in not anticipating the injury. In *Jones v Boston & M. R. Co.* the plaintiff's intestate was approaching a railway crossing and due to storm and rain beating on the top of his truck, did not see or hear a tram approaching. It is not wholly clear whether or not

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23 186 Ky. 371, 216 S. W. 579 (1919).
24 47 Pa. Sup. 228 (1911). See also Austin v. Eastern Mass. St. Ry. Co., 269 Mass. 420, 169 N. E. 484 (1930) (Plaintiff was faced with an emergency in that two vehicles were approaching and plaintiff, fearing the space was too narrow otherwise, turned right onto a street car track and just ahead of a street car. He was entitled to an emergency instruction to excuse his own conduct and a last clear chance instruction respecting the conduct of defendant).
25 83 N. H. 73, 139 Atl. 214 (1927).
he had been previously negligent. It was held, however, that the evidence did not warrant an emergency instruction in favor of the defendant but rather the situation made a last clear chance instruction appropriate. The defendant railway, in checking speed, did not sand the rails. Even this, however, would have been ineffective as the only chance of rescue was to warn the driver. The evidence was in some conflict whether the whistle was sounded. The engineer was found to have sensed the situation when he was some 50–60 feet away. A railway should be on the lookout for vehicles at a crossing and for that reason was not entitled to an emergency instruction. If there was a last clear chance it consisted in blowing the whistle. On the other hand, if the plaintiff puts himself in peril and on discovery of his peril does not endeavor to avoid it, he cannot claim the privilege of throwing the burden on the defendant through the last clear chance.

Sometimes the emergency offers no true alternative, as the one course is merely the converse of the other, like Hamlet’s "to be or not to be."

Both the plaintiff and the defendant may seek an emergency instruction, the former to avoid the imputation of contributory negligence and the latter to show that his course was not, under the circumstances, negligent. Thus, in Wilson v. Roach the defendant was proceeding along the street at a point where the space was just sufficient for traffic to pass in both directions. The plaintiff, coming in the opposite direction, had stopped her buggy, thus blocking traffic. Just before the defendant reached the area opposite the plaintiff, a car parked on his right suddenly backed out and defendant turned sharply left to avoid it. In this way he struck the plaintiff. He contended both that the emergency forced him to make a hurried choice and also that the plaintiff was negligent in jumping from her vehicle and putting herself in a spot where it was impossible to avoid her. She, on the other hand, contended that she acted in an emergency


38 161 Okla. 38, 222 Pac. 1000 (1924).
in leaving the vehicle and that the defendant was negligent in failing to stop. The defendant was granted an emergency instruction. Presumably the result would have been the same if the jury had been given such an instruction for each of the parties. If each acted under an emergency and prior negligence was absent, the result is an inevitable accident. In *Luce v Chandler* the defendant, while passing a car, suddenly saw the plaintiff coming. He turned right into the ditch to avoid the car he was passing. The plaintiff did not apply his brakes for fear of skidding and it turned out that he hit the defendant. It was held that the former and not the latter was entitled to an emergency instruction, because in the latter's case he was driving at too high a speed.

2. **Immediate Danger to Actor Only, foreseeable.**

This means that the actor sees immediate danger to himself, but does not, because of the emergency, foresee danger to others, although it is present. Five cases have been found which answer this description. In *Barnhart v. American Glycerine Co.* the defendant was driving a truck loaded with nitroglycerin. On discovering that the truck was on fire, the driver abandoned it on a steep hill without setting the brakes or securing it against moving. As a consequence, it backed down hill and injured the plaintiff. A verdict for the plaintiff was reversed and the lower court was directed to enter judgment for the defendant. The expectable events, overturning and exploding, did not occur. In *Moody v. Gulf Refining Co.* an employee of the defendant was engaged in unloading a tank-car filled with gasoline. While emptying the spout at the bottom of the tank into a tub he was warned that rock blasting was going on nearby. He ran away to escape the danger. The tub overflowed and the overflow ignited and set fire to the plaintiff's building. There was a directed verdict for the defendant.

Similarly, where a restaurant employee picked up an improperly lighted gasoline lamp, carried it outside, and threw it away from himself, as a consequence of which it exploded,

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*224 Mass. 420, 113 N. E. 199 (1916).*

*113 Kan. 136, 213 Pac. 663 (1923).*

*142 Tenn. 280, 218 S. W 817 (1920).*
injuring the plaintiff, an involuntary non-suit was sustained on account of the emergency facing the defendant.\textsuperscript{42} So one who backfires about his own premises to protect them from a prairie fire and whose fire joins the other fire, is, as a matter of law, not liable, though the plaintiff's property is thereby destroyed. It may well be here that the defendant's act was not the proximate cause of the plaintiff's loss. However, a judgment for the plaintiff was reversed, due to the emergency which the defendant had to meet.\textsuperscript{43} In the same way, judgment for the plaintiff was reversed in \textit{Filippone v. Reisenburger}\textsuperscript{44} The plaintiff was being employed as a brick mason and was standing on the runway which extended into an excavation where a building was being constructed. One end of the runway rested on a barrel. The defendant, who was in the excavation, tried to climb upon the runway and stepped upon the barrel, which was near him. The barrel tipped over and the defendant caught the feet of the plaintiff, standing close by, in order to save himself from a fall. This caused the plaintiff to fall and to suffer an injury. No negligence was shown on the part of the defendant other than this.

One may compare another type of case where the matter of the lack of opportunity for deliberation was made prominent. In \textit{Brucker v. Freeman}\textsuperscript{45} B seized A by the arm and violently swung him around two or three times, then let him go. A became dizzy and involuntarily came violently against C, who instantly pushed him away, and he came in contact with a hook and was injured. One issue was whether C had time for deliberation and

\textsuperscript{42}Donahue v. Kelly, 181 Pa. 93, 37 Atl. 186 (1897).
\textsuperscript{43}Owen v. Cook, 9 N. D. 134, 61 N. W 285 (1899).
\textsuperscript{44}119 N. Y. S. 622 (App. D. 1909).
\textsuperscript{45}50 N. H. 420 (1870). This is exactly like the squib case, Scott v. Shepherd, 2 W Bl. 892, 96 Eng. Rep. 525 (K. B. 1773). In the matter of instinctive action, Laidlaw v Sage, 37 N. Y. S. 770, 773 (App. D. 1896) is similar, but it differs in that defendant's act may have been directly causal. Sage was threatened by one Norcross that the latter would destroy the building where the parties were with dynamite unless Sage should hand the latter a large sum of money. Plaintiff was standing nearby and Sage pulled him in between Norcross and himself. At once Norcross dropped the satchel of dynamite and the explosion from it injured plaintiff. The jury was instructed that if Sage moved the plaintiff involuntarily, i.e., without any formed intention to do so, he would not be liable. In 158 N. Y. 73, 53 N. E. 679 (1899) it was held that causation between Sage's act and plaintiff's injury was lacking. See Note in 7 Harv. L. Rev. 302 (1894). On the face of the matter causation, though possibly involuntary, was present.
reflection before he gave A the push, if not, he was not liable to A. The jury found that since C acted instinctively there was no break in the causation from the act of B.

The five first mentioned cases go much farther than the typical case later cited, for there can be no question of lack of causation. They have the common element of failure of opportunity for deliberation, though it is difficult to think that the defendant acted instinctively and wholly without reasoning. This later emergency doctrine, however, does not require that the act be done instinctively and without any deliberation in order to excuse the actor. One is entitled to an emergency instruction when his choice of alternatives must be made so hurriedly that he does not or cannot make the choice a reasonable man would have made if he had full opportunity for deliberation. Courts have not been able to consider degrees of emergency. Apparently res ipsa loquitur does not apply under such circumstances. The later developed rule seems to be that when an actor is faced with immediate danger to himself he may choose the alternative favorable to himself when he does not have adequate opportunity to consider fully the possible consequences of his act to unidentified other persons. We have as yet no answer to the question how far one may protect himself by casting the danger upon another identified person. A note writer in the Harvard Law Review on the Owen v. Cook case says

“One may not in all cases protect himself at the expense of his neighbor, even though the danger be imminent and to say that compulsive necessity will excuse, is to introduce a standard too unstable and too indefinite for a rule of law. It therefore seems correct to say that where the act done under stress of circumstances is the result of the exercise of the reasoning faculties however rapid, the actor is subjected to the ordinary rules of legal liability. What then is the criterion in those cases where one in warding off danger from himself, forces it onto another?”

The writer concludes that the key lies in the issue of instinctiveness v. deliberation of the actor. The earliest of the five cases is dated 1897 and the latest is of the year 1923. It appears that even as the Harvard note was being written a new step was being taken. “Compulsive necessity” will not justify one in protecting himself by thrusting the danger upon his neighbor in an emergency. But there is this difference. In the five cases one’s “neighbor” is not an identified person. He is any member

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46 13 Harv. L. Rev. 599 (1900).
of the public who, foreseeably to others but not to the actor, may innocently place himself in the danger zone. In the problem of the Harvard note writer the plaintiff is an identified person whom the actor seeks to substitute for himself, as in the Laidlaw v. Sage case. 47

These cases seem to constitute a landmark in the development of the emergency doctrine. Originally the defendant was not liable when his act was to such an extent instinctive or involuntary that he did not break the causal connection of the act of an earlier actor, A, taking effect upon X through himself. Next defendant’s act is causal itself but he instinctively substitutes B, an ascertained individual, in his stead to bear the risk. In the third stage his act is causal and is not merely instinctive. The danger need not threaten himself alone or perhaps not at all, but threatens others, or himself, or both. There is at least a brief period to consider alternatives and defendant, due to the emergency, does not make the best choice of alternatives. It seems to make no difference whether defendant’s act is one of commission or of omission. This is our usual emergency doctrine. Finally, the immediate danger threatens defendant only Were it not for his fright and confusion, defendant could foresee that his act would probably injure some other person. He thrusts that danger from himself onto another person who is identified by the event and the actor is protected by the fact of acting in an emergency.

Perhaps under this later principle the result would be similar to that rule, also recent, where a defendant uses the property of another in an emergency but may be required to pay the damage so occurring, if causation is clearly present. The analogy, however, is not complete. The benefit to the defendant, as illustrated in the case of Vincent v. Lake Erie Transportation Co., 48 was measurable and here it would be difficult to measure.

Murney v. Thorpe 49 is as nearly the converse of these cases as can be found. The defendant drove his car at great speed and at night, without lights, and violated, as well, other traffic rules,

47 Supra n. 45. Under the criminal law one cannot by a positive act take the life of another identified person to save his own (Regina v. Dudley, L. R. 14 Q. B. D. 273 (1884); Arp v. State, 97 Ala. 5, 12 So. 301 (1893). But could he not indirectly do so by eating up all the food so that the others on the raft would starve? His act is then one of non-feasance and affects any persons who may chance to come within the orbit of its influence.

48 109 Minn. 456, 124 N. W. 221 (1910).

in order to escape a beating by a pursuer. In doing so, he injured his guest rider. He was refused an emergency instruction. There are clearly two grounds for the refusal. He was blameworthy in creating the emergency. He also had time for deliberation and the harm was foreseeable, even if he had not originally been blameworthy.


Traffic legislation and rules of the road. On a dark and stormy night the defendant was driving on the highway when he suddenly saw a pedestrian about eight feet in front of himself. The defendant turned sharply to the left to avoid the pedestrian and as a consequence collided with a vehicle coming from the opposite direction. The plaintiff, a guest rider in the approaching vehicle, was injured. The defendant claimed an emergency instruction. By law in this state a pedestrian is entitled to use the highway in a district where there are no sidewalks. The statute also requires a driver to drive only at such speed as will permit him to stop within the assured clear distance ahead, to employ such headlights as will illumine objects in the highway for a distance of two hundred feet and also to dim his lights on the approach of another vehicle from the opposite direction. The defendant had violated all of these provisions. The requirement to dim the lights was held not to cut down the provision for illumination of objects for a space of two hundred feet. The defendant was indeed faced with an emergency, but though he made the best choice possible he was not entitled to an emergency instruction. No case has been found where such a statute created a strict liability, lacking proximate cause.

So, where the defendant drove to the left past a street car contrary to an ordinance and was obliged to swerve on account of a pedestrian on the cross-walk ahead of him, he was liable for

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50. In Banks v. Banks, 283 Mich. 506, 278 N. W. 665 (1938) defendant was hurrying to take his injured brother, the plaintiff, to a hospital and ran through a red light. His car was struck by another driver, as a result, and plaintiff was further injured. Plaintiff brought an action, relying upon a statute providing penalties for violations of the traffic act (Sec. 4648, 1929 Stat.). Judgment for defendant n.o.v.

injuring the plaintiff, though after the emergency arose he did the best possible thing.\textsuperscript{52}

The driver of a vehicle is entitled to rely on the expectation that another driver will observe the rules of the road. Thus, a driver defendant, in reliance on such expectation, did not stop on seeing another vehicle being backed out onto the highway in front of himself. As a result, he was unable to avoid a collision. The failure of the other driver to stop before entering the highway avoids a charge of negligence made against the defendant by his guest rider.\textsuperscript{53}

A violation by the defendant of the statutory rules of the road to avoid a collision\textsuperscript{54} will not necessarily prevent an emergency instruction. One is privileged to take the left side on account of defective conditions of the highway on his own side or because of a prudent choice among other hazards.\textsuperscript{55} Since the defendant is not under a strict liability, a violation of the rules of the road must be the proximate cause of the plaintiff's injury if the latter is to recover,\textsuperscript{56} though there may be a recovery if the defendant, prior to the violation of the rules of the road by himself, had been forced into this violation by prior negligent driving.\textsuperscript{57} The defendant is liable if the injury occurred after the emergency was once and for all over.\textsuperscript{58} Traffic statutes and ordinances set up a standard of care which is frequently no higher (though likely more definite and positive) than the common law rules of due care.

\textit{Common law rules of the road.} Such statutory provisions would probably be for the most part common law rules of the road even without legislation. The requirement to so drive that stopping is possible within the assured space ahead is binding

\textsuperscript{52}Walker v. Rebehr, 255 Mich. 204, 237 N. W. 389 (1931). Simonson v. Huff, 124 Wash. 549, 215 Pac. 49 (1923) (Defendant drove on wrong side of street to pass a team and a street car. His effort to avoid a pedestrian at the crossing will not entitle him to an emergency instruction).

\textsuperscript{53}Miller v. Stevens, 63 S. D. 19, 256 N. W. 152 (1934) (Verdict for defendant should be directed).

\textsuperscript{54}Hagenah v. Bidwell, 189 Pac. 799 (Cal. App. 1920), Sathrum v. Lee, 180 Minn. 163, 230 N. W. 580 (1930); Sheffield v. Union Oil Co., 22 Wash. 386, 144 Pac. 529 (1914).

\textsuperscript{55}Johnson v. Heitman, 88 Wash. 595, 153 Pac. 331 (1915).

\textsuperscript{56}Sudbrook v. State, 153 Md. 194, 138 Atl. 12 (1927).

\textsuperscript{57}Ritter v. Johnson, 163 Wash. 153, 300 Pac. 518 (1931).

\textsuperscript{58}Henderson v Land, 42 Wyo. 369, 295 Pac. 271 (1931).
at common law and a violation of it will prevent the giving of an emergency instruction.\textsuperscript{69}

It is negligent at common law to drive only a short distance behind another car so that it would be impossible to avoid a collision if the front vehicle should stop suddenly\textsuperscript{60} or to operate with defective lights;\textsuperscript{61} or to fail to check usual speed when passing a school or along a street where children are;\textsuperscript{62} or to enter traffic with defective brakes;\textsuperscript{63} or not to check usual speed at crossings where pedestrians may be expected to be;\textsuperscript{64} or not to anticipate that other cars may be approaching from a cross street;\textsuperscript{65} or to pay scant attention to a sign "Men working"\textsuperscript{66} and in such cases no emergency instruction will be given. Likewise, it is negligent to drive at the usual speed down a declivity on a gravel road and then be forced to turn sharply to the left shoulder of the highway to avoid a collision with another vehicle approaching from a driveway. It is foreseeable that the defendant’s car may be overturned and may injure the guest rider.\textsuperscript{67} Similarly, a driver, on seeing a cloud of dust

\textsuperscript{60} Bowmaster v. De Pree, 252 Mich. 501, 233 N. W. 394 (1930) (Snow storm prevented driver from seeing more than a few feet ahead. He must drive with corresponding care). Cf. Prior v. Safeway Stores, 196 Wash. 362, 83 P. (2d) 241 (1938) (Cloud of dust created by a sweeper entered by defendant, from which an emergency developed).


\textsuperscript{62} Carnahan v. Motor Transit Co., 224 Pac. 143 (Cal. App. 1924)

—frequently controlled by statute.

\textsuperscript{63} Ratcliffe v. Speith, 95 Kan. 823, 149 Pac. 740 (1915).

\textsuperscript{64} Allen v. Schultz, 107 Wash. 393, 181 Pac. 916 (1919).

\textsuperscript{65} Stone v. Baton Rouge Yellow Cab Co., 12 La. App. 216, 124 So. 778 (1929), McFeat v Philadelphia Co., 69 Atl. 744 (Del. 1908) (A plaintiff is negligent who puts himself voluntarily in a position of danger and the emergency thus created does not excuse him. This case is interesting for another reason. The state constitution provides, in sec. 22, that “Judges shall not charge juries with respect to matters of fact but may state the questions of fact in issue and declare the law.” The judge said in the presence of the jury (after motion by defendant for non-suit) that he had grave doubt of plaintiff’s right to recover upon the evidence presented but that he thought the case should go to the jury and that therefore he declined to order a non-suit. It was held that this was not a violation of the constitution because the language was not addressed as an instruction to the jury).


\textsuperscript{67} Chaney v. Moore, 101 W Va. 621, 134 S. E. 204 (1926).

\textsuperscript{67} Madden v. Pearl, 201 Wis. 259, 229 N. W. 57 (1930).
ahead, must anticipate the possibility of other vehicles being within it. So one driving a huge truck in a crowded street where vehicles are parked and traffic is moving in the opposite direction, is held to a nice calculation of the space available. He strikes a parked car at his peril and his only alternative is to stop and wait. No subsequent emergency will excuse a driver at a crossing from looking for an approaching train. So a plaintiff cannot ignore facts well known by himself and still claim an emergency instruction to excuse his own negligence. Thus, in Brown v Southwestern Tel. Co., the plaintiff fell into a hole on the defendant’s premises near the former’s barn, while attempting to head off a calf. It is hard to see any application at all of the emergency doctrine here to condone contributory negligence. In Windsor v McKee the court went so far as to say that it is not the negligence in an emergency that the law does not excuse but rather the negligence that brought about the emergency. While as a practical matter this is usually true, yet, as elsewhere observed, one must also exhibit the care of an average prudent person in similar emergencies.

In the rescue cases, is the rescuer, when injured, entitled to an emergency instruction? If so, he enjoys something in the nature of a privilege. There are many such cases involving railway accidents. In Wagner v International Ry. Co. the plaintiff’s cousin was negligently hurled from an interurban-street car at the beginning of a trestle by the lurch of the car. The plaintiff got out and walked back to rescue him and was seriously injured. It being granted that the defendant’s negligence was the proximate cause of the injury, the defendant claimed that the plaintiff was guilty of contributory negligence and was not entitled to the benefit of the emergency rule. It was held that in such cases a liberality in the application of it was desirable and the court should consider the hurry and excitement of the plaintiff under the circumstances. So also a truck stop-

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68 Hall v. St. Louis San Francisco Ry Co., 240 S. W 175 (Mo. 1922).
69 274 S. W 816 (Mo. 1925).
70 22 S. W (2d) 65 (Mo. App. 1929).
71 See Prosser on Torts (1941) pp. 360-361.
72 232 N. Y. 176, 133 N. E. 437 (1921).
ping on the left of the road to pull a stalled vehicle from the
ditch is not by that fact guilty of contributory negligence in a
later developing emergency. He enjoys a privilege. So one
who approaches to rescue another being gored by a bull is not
guilty of contributory negligence when he himself is injured by
the bull, though it turned out that he extended no aid. This is
the converse of the case where the actor sees danger to himself
only, foreseeability of danger to others being excluded by the
emergency.

Is there a higher standard of care applicable to professional
rescuers? In Blackwell v. Omaha Athletic Club the plaintiff
and another woman were swimming in a pool. The latter called
for help and the plaintiff responded. The lifeguard thought it
was the plaintiff who was in peril and pulled her out and injured
her. It was held that the lifeguard should use such care in
rescuing as would be used by an ordinarily cautious lifeguard
under like circumstances. It is interesting that no emergency
instruction was sought.

Are officers who, while engaged in the performance of duty,
fail to observe traffic regulations (as a result of which they either
injure others or are injured by others) entitled to the benefit of
the emergency rule? The negligent act of A who, when about to
turn onto the main highway, drives to the left of the side road
and stops does not make him liable to an officer who crashed into
A's car by virtue of his riding a motorcycle at a reckless speed.
The officer cannot justify his conduct on the emergency doctrine
and thus escape the consequence of his contributory negligence.
There may also be the defense of lack of proximate cause. In
Swoboda v. Brown a motorcycle officer passed defendant at
an intersection and also failed to give a passing signal, both
forbidden by ordinance. He was injured by the defendant,
whom he charged with making a left turn without giving the
appropriate signal. An emergency instruction to offset his own
contributing act was denied him.

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289 (1933). Judgment for plaintiff. See also Hampton v. Joyce,
intra, note 81 (The reasonable care of prudent police officers)
Cf. 13 N. Y. L. Q. Rev. 129 (1936), Restatement of Torts §299d.
28 Sudbrook v. State, 153 Md. 194, 138 Atl. 12 (1927) (Judgment
for plaintiff's intestate reversed).
29 129 Ohio St. 512, 196 N. E. 274 (1935).
It is the common practice to read into such ordinances an exception in favor of municipal officers so that there may be no traffic impediment in the performance of their duties. This practice would have the result of removing contributory negligence as a defense when the officer is the plaintiff. If, however, his own conduct is the proximate cause of the injury, it would be unusual to hold the defendant to such a standard of care as to make him essentially an insurer. But where the plaintiff's speeding is only a contributory cause and the speed rule is inapplicable to him as an officer, he should recover if the defendant's negligence was a substantially contributing factor to the injury. It has been suggested that police officers, in seeking to arrest offenders, must use the reasonable care of the average prudent police officer in the circumstances. Thus, one may assume an actual lower standard of care in the case of a police officer than is required of the average prudent man, though a higher standard may be applied to professional rescuers. In these cases, however, the emergency, that of following up a law-breaker, is dissimilar to that here under discussion. Injury to others is foreseeable. If the officer's conduct is excused, it is because he is privileged.

4. The Function of Judge and Jury.

Directed verdicts. In Ingle v. Cassidy the defendant's car began to shimmey and at about the same time a tire blew out. The vehicle went over an embankment and injured the plaintiff, a passenger in it. There was also some evidence that the defendant, in her confusion, put her foot on the accelerator rather than on the brakes. The court non-suited the plaintiff on the ground that the defendant was faced with an emergency and was not shown to have acted without due prudence in the circumstances. The dissenting opinion declares that the question of the existence of an emergency and of the exercise of due prudence is universally one for the jury. Though one may be surprised at the fact that the plaintiff was non-suited in this case, yet it is a fact that an involuntary non-suit or a directed verdict is not at all unusual. In 22 cases examined in this study...
in which the court directed a verdict only one of them was in favor of the plaintiff.

In *Allen v. Schultz* one might have expected a directed verdict. There the defendant, whose brakes were defective, injured a crippled person who was alighting from a street car. The defendant had approached from a side street, mistook the speed of the street car, and believed it was not about to stop at the usual stopping place. When too late, he undertook to go behind the street car and thus the accident occurred. A directed verdict seems justified on two grounds (1) assuming that the defendant was faced with an emergency, his defective brakes contributed to his inability to extricate himself, (2) he was negligent in that he did not await the performance of the motorman. There was no serious conflict on these matters in the evidence. In *Pnor v. Safeway Stores* the amount of damage only was left to the jury and the court instructed that the defendant was negligent as a matter of law. The defendant driver saw ahead of himself and going in the same direction, a road-sweeper, which was being operated slowly. A great cloud of dust arose. The defendant also saw, about a quarter of a mile distant, a car coming from the opposite direction, which he believed was about to turn onto a side road. The defendant drove into this dust cloud without checking speed and, finding himself about to collide with the approaching car, turned right and into the road-sweeper, injuring the plaintiff, its driver.

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**Notes:**

84 In approximately 117 cases studied the court of final jurisdiction approved of 7 directed verdicts for defendant; 12 involuntary nonsuits and dismissal of petitions; and ordered that 15 judgments for plaintiff be reversed and judgment be entered for defendant, a total of 34. One directed verdict for defendant was overruled with judgment for plaintiff n. o. v. One dismissal was not sustained. One verdict for defendant was overruled and new trial granted on exceptions.

On the other hand, 43 judgments for plaintiff were sustained and 13 for defendant; 20 judgments for plaintiff and 12 for defendant were overruled and remanded for new trial.

Here are some interesting points of comparison. The jury (or in a few cases the court sitting without a jury) favored the plaintiff in 75 cases and the defendant in only 24 cases. The court reversed judgments for plaintiff in 34 cases (in addition, involuntary nonsuits, directed verdicts, and dismissals in 33 cases). It overruled one directed verdict for defendants and one dismissal, and reversed judgments for defendants in 12 cases. In 57 cases one of the parties, generally the defendant, was a corporation.

85 107 Wash. 393, 181 Pac. 916 (1919).

86 196 Wash. 382, 83 P. (2d) 241 (1938) (Only case of directed verdict for plaintiff).
There being no substantial dispute as to the facts, a verdict for the plaintiff was directed. This result probably conforms to the rule stated in Kentucky,\textsuperscript{87} that the question of the existence of negligence and contributory negligence is for the jury unless only one conclusion can be drawn from the proven facts.

In emergency cases there are five questions which commonly should be for the jury. First, was there a true emergency or was there time for deliberation?\textsuperscript{9} Second, if there was an emergency, did the party claiming the instruction exercise the proper prudence of the reasonable person faced with an emergency, in extricating himself therefrom?\textsuperscript{9} It is not sufficient for him to use his own individual best judgment. He must exercise the discretion of the average prudent person who acts under similar circumstances of emergency.\textsuperscript{88} Third, did he cause the emergency, or was he guilty of negligence immediately prior thereto which contributed to it?\textsuperscript{9} Fourth, did the opposing party negligently contribute to the result?\textsuperscript{9} Fifth, was the defendant's conduct the proximate cause of the injury?\textsuperscript{9}

There are many cases where the evidence shows that the plaintiff placed himself in a position of peril and fails to show that the defendant did not act prudently or could have prevented the harm by an observance of the last clear chance. Thus, in Kentucky Traction & Terminal Co. v Roschli\textsuperscript{89} the evidence showed that the plaintiff's intestate placed himself and his team upon a street car track just ahead of an oncoming car and that the defendant did all possible to stop the car before the collision occurred. There being no contradiction in the evidence, a directed verdict was proper. Both the doctrine of the last clear chance and the rule applicable where one acts in an emergency were considered by the trial court. An instruction as to the one

\textsuperscript{87} Padgett v. Brangan, 228 Ky. 440, 22 S. W (2d) 446 (1929).

\textsuperscript{88} See, among other cases, Gravel v. Roberge, 125 Me. 399, 134 Atl. 375 (1926), Dahlstrom v. Hurtig, 209 Minn. 72, 295 N. W 508 (1940); Barshadt v. Gresham, 120 S. C. 219, 112 S. E. 923 (1922).

\textsuperscript{89} 186 Ky. 371, 216 S. W 579 (1919). See also Fernald v. French, 121 Me. 10, 115 Atl. 420 (1921) (Plaintiff turned his car across the street just ahead of defendant, who unsuccessfully turned right to avoid a collision. There was no true alternative here and while result is sound, there seems to be no occasion for the application of an emergency rule), Ratcliffe v. Speith, 95 Kan. 823, 149 Pac. 740 (1915) (Flagman waved flag toward plaintiff, who was about to cross railway track, as a warning. Plaintiff mistakenly interpreted this as an invitation to cross and was injured. Directed verdict for defendant, however, overruled and new trial).
issue would seem to preclude one respecting the other where there is no conflict in evidence. If there was a last clear chance, the defendant was faced with no emergency. If the defendant acted in an emergency, he did not have the last clear chance. In *Pennington v. Pure Milk Co.* a truck driver suddenly found several boys coasting on hand-sleds onto the highway. He swerved to the left in an unsuccessful attempt to avoid them. Contributory negligence not being chargeable to the children, it was held that the defendant was entitled to a peremptory instruction because of failure to show lack of prudent conduct on his part in the emergency. Thus, the existence of an emergency, the absence of prior fault, and of contributory negligence (by the plaintiff's intestate) and of prudent conduct were all for the court under the evidence. Similar is *Stewart v. Central Vt. Ry. Co.* where the conductor of a train threw the emergency brake to avoid injuring a would-be passenger who fell almost beneath the coach while rushing to board the train. The sudden stop threw and injured the plaintiff, a passenger, who had not yet found a seat within the passenger coach.

The existence of an emergency and the exercise of due care

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279 Ky. 235, 130 S. W (2d) 24 (1939).

86 Vt. 398, 85 Atl. 745 (1913). Cf. Lunzer v. Pittsburgh & L. E. R. Co., 286 Pa. 393, 145 Atl. 907 (1929) (Plaintiff sought to avoid contributory negligence by proving an emergency. But his prior negligence prevents an emergency instruction and no showing here of negligence on part of defendant nor of last clear chance); Greyhound Lines, Inc. v. Noller, 36 F. (2d) 443 (7th 1930) (Bus turned left to avoid car in front, which stopped suddenly. Driver had three alternatives—go straight, turn right and hit curb and telephone poles, turn left and collide with plaintiff, approaching in a car. Chose latter. Not liable as matter of law); Kalso v. Wilson, 252 Mich. 520, 233 N. W 401 (1930) (Defendant forced to apply brakes suddenly to avoid a negligent driver and skidded into a telephone pole, thus injuring a guest rider); Bulie v. Stephens, 113 Wash. 182, 193 Pac. 684 (1920) (Plaintiff was on roller skates on wrong side of street. Created an emergency for defendant. Fact that defendant was exceeding the speed limit was not the proximate cause of injury. Plaintiff was non-suited); Madden v. Peer, 291 Wis. 258, 229 N. W 57 (1930) (Defendant saw a car approaching from a driveway at right angle with the highway and turned sharply left onto the shoulder of the road to avoid a collision. Car skidded and overturned and guest rider killed. The defendant is not guilty of failure of due care in the emergency); Miller v. Stevens, 63 S. D. 10, 256 N. W 152 (1934) (Defendant relied on the observance of the rules of the road by another driver. The latter was backing out from a driveway in front of defendant. Defendant did not stop but later swerved to the left when it was too late to stop. A collision was not thus avoided and a guest in defendant's vehicle sued him. He gets a directed verdict).
are jury questions generally. As above indicated, many courts hold that these emergency cases are for the jury. It would be difficult to reconcile them all with the cases just considered. Thus, in *Carpenter v. Campbell Auto Co.* the court says that the existence of an emergency is for the jury and also the question whether the defendant exercised in the emergency (if there was one) the necessary prudence (should he have turned left or right) and also, if there was an emergency, whether the defendant's earlier negligence contributed to bring it about. After the emergency was passed, did he recover the aplomb of the average careful man so as to meet new exigencies? *Elmore v. Des Moines City Ry. Co.* seems to be an extreme case and no motion for a directed verdict was made by either side. A verdict for the plaintiff was affirmed. As the plaintiff was descending from a street railway the car lurched and she was on her feet but in an unbalanced position. As the street car moved on, she grasped the rear bumper and was dragged three-fourths of a mile. She mistakenly feared to let go on account of the presence of a vehicle just behind. The emergency being conceded, it was an issue for the jury whether she exercised appropriate prudence in clinging to the bumper, from which fact she suffered seriously.

A question for the jury is, did the party pleading the emergency exercise the prudence of an average man so that he acted as an average man would under similar circumstances? Undoubtedly some of these cases would, in some states, require a directed verdict. In *Sieb v. Central Pennsylvania Traction Co.* the plaintiff's intestate was riding in a wagon. The horse became frightened and the driver cut across a street car track to bring him under control. Decedent jumped from the wagon and was killed. The motorman could have stopped in time to avoid the accident. It was left to the jury whether decedent was guilty of contributory negligence so as to prevent a recovery or was excused by the emergency. Likewise, in *Casey v. Siciliano* the

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*159 Iowa 52, 140 N.W. 225 (1913).*
*207 Iowa 682, 224 N.W. 28 (1929).*
*47 Pa. Sup. 228 (1911), Brooks v. Petersham, 16 Gray 181 (1860) (Due to some defects in the street, plaintiff's horse became unmanageable and ran away. Plaintiff, having lost control, turned the horse from the road and was injured. The facts seem to indicate that plaintiff, by imprudence in the emergency, was guilty of contributory negligence, but the facts are not very clear).*
*310 Pa. 238, 165 Atl. 1 (1933); Kosrofian v. Donnelly, 117 Atl.*
defendant attempted to pass a street car in which the plaintiff was a passenger. The street car had stopped. A child suddenly appeared and the defendant cut quickly to the right to avoid the child, thus injuring the plaintiff, a street car passenger. It seems that there was an emergency not of defendant’s own making and the question of contributory negligence, therefore, did not arise.

It has been observed that while courts somewhat readily direct verdicts (or the equivalent) for the defendant, they are reluctant to do so for the plaintiff and cases involving an emergency, when they do so, are rare. Thus, in *Austin v Eastern Mass. St. Ry. Co.*,6 the plaintiff was driving properly in a narrow street, two vehicles were rapidly coming toward him from the opposite direction. On the plaintiff’s right was a street car line and a street car was approaching him from the rear. Fearing that there was not sufficient space to avoid the vehicles in front, he turned right upon the street car line and was struck by the street car. The court refused him a directed verdict, though it observed that a mistaken choice may be prudent. Measurements showed that he could have continued straight ahead without colliding.

Conclusion. If this discussion has value, it is likely to arise more from the illustrations and groupings than from any formulation of conclusions that can be precisely stated. An emergency arises when a person is required to take one of several courses and has no opportunity to deliberate, which course involves greater peril to himself or to others, or to both himself and others. The peril would be foreseeable if there were opportunity for the actor to consider the ultimate possible consequences of his conduct. He is privileged to adopt a course prudent under the circumstances, which would not have been appropriate but for the emergency. Fright and confusion are often present but their absence will not necessarily prevent an emergency instruction. The result may depend on the fact that children are affected, or by the possibility of a last clear chance. If a party

421 (R. I. 1922) (Defendant swerved his car to the left to avoid a pedestrian who suddenly ran out in front. He collided with plaintiff’s car going in the opposite direction. He claims a directed verdict. Held, both question of proximate cause and of due prudence in an emergency are for the jury); Rawlings v. Erwin Motor & Machine Co., 67 Pa. Sup. 88 (1916) (Question of due prudence shown by plaintiff in emergency and also contributory negligence on his part, which may well be identical).

created his own emergency, he is not entitled to an emergency
instruction where he violates a statute or the rules of the road.
An emergency may remove the charge of contributory negligence on the one hand and also the claim of the last clear chance on the other.

Generally speaking, the issue of the existence of an emergency and the question of the exercise of due care in the emergency are decided by the jury. This study tends to indicate that at least in emergency cases a verdict is rarely directed for the plaintiff, but it is not rare that a verdict or its equivalent is directed for the defendant. Many more judgments for the plaintiff are reversed than are reversed for the defendant and the jury finds for the plaintiff much more frequently than for the defendant.

There are certain cases where the actor has acted precipitately in order to avoid an immediate danger to himself. It is hard to conceive that in these cases even an instant's reflection would not have foretold danger to others. This fact of immediate personal danger is held adequate to create a privilege in the interest of self preservation unless the actor's conduct in coming into the emergency was blameworthy. Thus, the emergency doctrine has taken a new step. As in the Vincent case, where property was affected, so here, where personal safety is involved, one may put the immediate loss onto another, at least if that other person is unidentified at the time. So far no method has been found of weighing the advantage to him and the harm to the other by giving damages, measured either by the value of the advantage to the defendant or the harm to the plaintiff. If, however, a party by his own negligence created the emergency, he cannot have the benefit of an emergency instruction to excuse his negligence. The cases examined are insufficient to permit of general conclusions regarding children or experts who are faced with emergencies.